Supreme Court, U.S.
FILED

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No. 03-

In the Supreme Court of the United States

HARPREET KAUR,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARGARET WONG
Counsel of Record
MARGARET WONG &
ASSOCIATES CO., LPA
3150 CHESTER AVENUE
CLEVELAND, OH 44114
(216) 566-9908
(216) 566-1125

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

I. After Petitioner established past persecution, neither the Immigration Judge nor the Board properly applied the regulatory presumption of a well-founded fear of persecution.

II. The decision of the Ninth Circuit is flawed and inconsistent with prior Ninth Circuit law.

III. The Ninth Circuit should have remanded Petitioner's case as the Agency never addressed whether Petitioner had demonstrated compelling reasons for being unwilling to return to India arising out of the severity of the past persecution.

PARTIES TO THE PROCEEDING

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OPINION BELOW

The opinion of Court of Appeals for the Ninth Circuit was entered on December 18, 2003, under the caption Kaur v. Ashcroft, No. 02-74450 (9th Cir. 2004)(unpublished). The decision is attached hereto as Appendix A. Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on March 2, 2004. The Order is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 18, 2003. The Ninth Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on December 9, 2002. The former Immigration and Naturalization Service commenced removal proceedings because Petitioner had remained in the United States longer than permitted by the Attorney General.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed on May 28, 2004, which is within 90 days of the date the Petition for Review. Thus, the jurisdiction of this Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 208.13(b)(1)(i)(1999):

> "If it is determined that the applicant has established past persecution, he or she shall be presumed also to

> have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return."

8 C.F.R. 208.13 (b)(1)(ii)(1999):

> "An application for asylum shall be denied if the applicant establishes past persecution under this paragraph but it is also determined that he or she does not have a well-founded fear under paragraph (b)(2) of this section, unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence arising out of the severity of the past persecution."

REASONS FOR GRANTING THE WRIT

I. The instant appeal involves the failure the Board to properly apply the regulatory presumption of a well-founded fear of future persecution when Petitioner established past persecution. An asylum applicant who establishes past persecution is entitled to a presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1)(i)(1999). The presumption can be overcome if the Government establishes by a preponderance of the evidence that country conditions have changed to such an extent that the applicant no longer has a well-founded fear of future persecution. Id.

In the instant case, at the very least, there is significant doubt whether the Board or Immigration Court gave

Petitioner the benefit of the presumption where it was found that Petitioner established past persecution. The Immigration Judge never states in his decision that the Government established by a preponderance of the evidence that the presumption had been overcome due to changed country conditions. Additionally, the Board never even addressed the presumption. Failure to apply the presumption constitutes reversible error. Thus, the Ninth Circuit should have remanded the case to the Board to give the Agency an opportunity to address the presumption in the first instance.

II. Petitioner also contends that the instant Petition should be granted as the Ninth Circuit's decision conflicts with its own prior decisions. The decision is also incorrect.

The Immigration Court, Board, and Ninth Circuit all concluded that the conditions in India have improved for Sikhs, specifically All India Sikh Student Federation (AISSF) members. Petitioner was actively involved in the AISSF. Her activities included organizing rallies and speaking in support of the group, which endorsed an independent Sikh state.

In Singh v. Ashcroft, 2003 WL 22170683 (9th Cir. 2003)(unpublished)(attached as Appendix E), a panel of the Ninth Circuit relied on the same two Country Reports that were at issue in the instant case and found that the Government did not establish that country conditions have changed for Sikhs to an extent to overcome the regulatory presumption of a well-founded fear of persecution. Thus, asylum was granted. Additionally, the instant case is also in conflict with Kataria v. INS, 232 F.3d 1107 (9th Cir. 2000), where the 1996 Country Report was analyzed as it related to an AISSF member and treasurer. In Kataria, the Ninth Circuit held that "the record clearly shows the evidence of

country conditions is not sufficient to rebut the presumption." Id. at 1115.

There is no logical way to reconcile these prior cases with the Ninth Circuit's ruling in the instant case. While the applicants in Kataria and Singh were granted asylum because the Ninth Circuit held that the evidence of country conditions relating to AISSF members was clearly not sufficient to rebut the presumption, Petitioner has been ordered removed to India where she suffered from extreme past persecution. As it stands, she will be removed despite the fact that the Ninth Circuit has previously found that conditions have not changed for those in her situation to an extent that would warrant a finding that the presumption has been overcome.

III. The Petition should also be granted because the Ninth Circuit did not remand Petitioner's case where neither the Immigration Judge nor the Board addressed whether Petitioner had demonstrated compelling reasons for being unwilling to return to India. Where an asylum applicant establishes past persecution, as she did here, and the Government rebuts the presumption of a well-founded fear of persecution, the asylum application should be denied unless it is determined the applicant has demonstrated compelling reasons for being unwilling to return to her country of nationality arising out of the severity of past persecution. 8 C.F.R. § 208.13(b)(1)(ii). Under the regulations, this issue must be addressed prior to denying an asylum application in any case where an applicant establishes past persecution. Since the IJ and Board failed altogether to address this issue, the Ninth Circuit should have remanded the case to the Agency to allow for a determination of whether Petitioner established compelling reasons for being unwilling to return to India arising out of the severity of her past persecution.

The Ninth Circuit's decision contains significant legal errors. It is also inconsistent with its own case law on the same issue presented in the instant case. The case is of extreme importance, especially when considering that legal errors in asylum cases may result in deportation to a country where applicants legitimately fear for their safety, as in the instant case. Accordingly, Petitioner respectfully requests that the Court grant her writ of certiorari.

STATEMENT OF THE CASE AND FACTS

Petitioner is a native and citizen of India. She is a 35-year old Sikh female, married to a fellow Sikh, and a mother of two United States citizen children. Petitioner came to the United States in 1992 as a nonimmigrant visitor. She stayed beyond the time permitted by her visa and was charged with being subject to removal under INA § 239(a)(1)(B).

Petitioner conceded that she was subject to removal as charged in the Notice to Appear and requested asylum, withholding of removal, relief under Article 3 of the Convention Against Torture, and voluntary departure. Petitioner left India because of past persecution and her fear of future persecution at the hands of the police in Punjab (Northern India) and West Bengal (Eastern India). This was on account of her membership and leadership role in the All India Sikh Student Federation (AISSF), which is a political party of Sikh youths demanding Khalistan, an independent Sikh state. Although there were different factions in the Sikh movement, her particular faction did support the Khalistan movement.

Petitioner was a student at the University of Calcutta and lived with her father in Calcutta. She joined the AISSF in 1988 and became President of her local organization at the school, which had approximately 25 to 30 members.

In November 1989, Petitioner was extremely active in the election campaign in the Punjab. This was approximately 1100 miles away from where she lived. She was arrested at a rally while shouting Khalistan slogans. She was held for six days, beaten and tortured, and released upon payment of a bribe.

She was again arrested in 1990 at a political rally in Calcutta, West Bengal. She was a speaker and principal organizer of this rally. Petitioner had organized this rally as President of her college unit of the party.[1] Petitioner was arrested along with twelve others. She was kept in custody for three days, her hands were tied, and she was beaten. Petitioner was released only after her father paid a bribe.

After she was released, Petitioner continued to be active in holding rallies and meetings. She was not arrested in conjunction with her organization or participation in these rallies.

In November 1992, Petitioner was the principal organizer and principal speaker at a rally of 25 to 30 people in Calcutta. At the rally, there was an encounter with an opposition political party who opposed Khalistan. The police forcibly dispersed the rally. Police assisted Petitioner's opponents by doing a baton charge on rallyists, throwing tear gas and bombs on those supporting the rally, and arresting them. Petitioner believed that police were biased against her organization and were targeting only her organization. Police arrested six of her colleagues. Petitioner was injured by a rock that was thrown by a Hindu activist when they were attacking her group. Petitioner was fortunately able to get away.

After this incident, Petitioner was extremely scared. Petitioner left college without completing her coursework and went into hiding with a friend who lived quite a distance away from Calcutta. She stayed in hiding until she left India.

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[1] There were approximately 40-50 people at this rally.

While Petitioner was in hiding, the police came to her house on at least two occasions to look for her. They also threatened her father. Due to the harassment from police, Petitioner's father was forced to relocate from Calcutta to Punjab. Petitioner testified that while he was in Calcutta, police threatened to harm her father if he did not reveal Petitioner's whereabouts.

After hearing the testimony and reviewing the evidence submitted, the Immigration Judge concluded that Petitioner's testimony was credible. (Appendix D, IJ decision, pp. 7)

> "In observing the [petitioner's] demeanor during the hearing, she strikes me as the kind of person who is knowledgeable about the politics she is discussing. She presents herself as the kind of person who would speak before crowds, who would take an activist role as opposed to many applicants for asylum who claim to have done things that are hard to believe based on their demeanor. But [petitioner] does appear to be a person who believes in her principles and has even perhaps a fiery personality and a determination to support these things. Therefore, I do believe her testimony that she was the president of the college's chapter of the Sikh Student Federation. That she spoke at rallies, although they are fairly small rallies; that she took an active role in the elections of the Punjab; and, that she was arrested because of these activities."

(IJ decision, pp. 6-7) Additionally, the Immigration Judge concluded that she suffered past persecution on account of her political opinion. (IJ decision, p. 8)

The Immigration Judge then stated that having established past persecution, Petitioner is entitled to a presumption of future persecution unless the Service established that country conditions have significantly changed. (IJ decision, p. 9) The only evidence in the record regarding changed country conditions was the 1996 U.S. Department of State Country Report and the 1997 Addendum. However, rather than giving Petitioner the benefit of the presumption, the Immigration Judge held Petitioner to the normal well-founded fear test in asylum cases. (IJ decision, pp. 9-10) Although the Court stated that the situation is far different than it was, the Court also recognized that bombs are still going off and people are still arrested. (IJ decision, p. 9) The Court concluded that in light of the "much reduced" problems of the Punjab, the Court would not believe that she would have a well-founded fear of persecution if she returned to the Punjab or Calcutta. (IJ decision, p. 10) Because she did not establish that she had an objectively reasonable fear of returning to India, the Court denied her asylum claim.

Petitioner timely filed an appeal to the Board of Immigration Appeals. On December 9, 2002, the Board of Immigration Appeals dismissed Petitioner's appeal. The Board agreed that Petitioner had suffered past persecution. However, the Board found that "the reduction of tensions between opposing groups, the similar treatment accorded all detainees by police, and the fact the [petitioner] last participated in the AISSF in 1992, demonstrates that the [petitioner] does not have a well-founded fear of future persecution if she returns to India." (BIA decision, Appendix C) The Board found the decision of the Immigration Judge was correct for the reasons stated therein. Id.

Petitioner filed a timely Petition for Review with the Ninth Circuit Court of Appeals. Citing the Ninth Circuit's decision

in Kataria v. INS, 232 F.3d 1107 (9th Cir. 2000), which relied of the same 1996 Country Report at issue in the instant case, Petitioner argued that the presumption of a well-founded fear of persecution had not been rebutted and that she was entitled to asylum.

On December 18, 2003, the Ninth Circuit Court of Appeals dismissed Petitioner's Petition for Review. The Ninth Circuit held that although Petitioner demonstrated past persecution, the consequent presumption of future persecution was rebutted by the 1997 Addendum to the India Country Profile. (Ninth Circuit's decision, p.2, Appendix A) The Ninth Circuit noted that although Petitioner testified that she was not merely a member but rather an organizer of the AISSF, substantial evidence supports the IJ's determination that relevant conditions in Punjab have changed so fundamentally between the time she was persecuted and her hearing that she no longer had a well-founded fear of persecution. Id.

Petitioner subsequently filed a timely Petition for Rehearing arguing that the decision was in direct conflict with Kataria and was an incorrect application of asylum law. On March 2, 2004, the Petition for Rehearing was denied. (Appendix B)

ARGUMENT

I. After Petitioner established past persecution, neither the Immigration Judge nor the Board properly applied the regulatory presumption of a well-founded fear of persecution

Evidence of past persecution can establish a well-founded fear of future persecution. Establishing past persecution, as

Petitioner did in the instant case, triggers a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1)(i)(1999).[2] The Department of Homeland Security can overcome this presumption by showing by a preponderance of evidence that conditions "have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return." Id. "In order to conclude, on the basis of changed country conditions, that an applicant's fear is no longer well-founded, the BIA must engage in an 'individualized analysis' that demonstrates that 'changed conditions . . . have eliminated the basis for [the applicant's] individual fear of future persecution." Navas v. INS, 217 F.3d 646, 657, n. 13 (9th Cir. 2000) *quoting* Osorio v. INS, 99 F.3d 928, 932-33 (9th Cir. 1996). The failure to apply the presumption constitutes reversible error. Fergiste v. INS, 138 F.3d 14 (1st Cir. 1998); Guinac v. INS, 179 F.3d 1156, 1163-64 (9th Cir. 1999).

In the instant case, the Immigration Judge noted that the Service has the burden to rebut the presumption based on significantly changed country conditions and that there was conflicting information. (IJ decision, p. 9) However, the Judge never actually gave Petitioner the benefit of the presumption in the case. The Judge concluded because of the reduced problems of Punjab, Petitioner would not have a well-founded fear of persecution if she returned to Calcutta or Punjab. The Judge never stated that the Government

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[2] This is the version of the regulation that governs Petitioner's case. The regulation was subsequently changed to state that the presumption can be overcome by showing a fundamental change in circumstances. The new standard makes it easier to rebut the presumption because it allows the Court to take into consideration more information.

established by a preponderance of the evidence that the presumption had been overcome by changed country conditions or that preponderance of the evidence was the appropriate standard. Additionally, the Judge never set forth which specific portions of the Reports that he relied on in making a determination that country conditions had changed in such a manner that the presumption was rebutted. The Judge held Petitioner to the standard that applies to asylum cases where an applicant has not established past persecution and must establish a well-founded fear of future persecution without the benefit of the regulatory presumption.

The Board's decision in the instant case did not even address the regulatory presumption. The Board merely stated that the evidence supports a finding that Petitioner does not have a well-founded fear of future persecution.

In the instant case, there is at the very least, significant doubt as to whether the Board and Immigration Judge applied the presumption set forth in 8 C.F.R. § 208.13(b)(1)(i)(1999). See Carcamo-Flores v. INS, 805 F.2d 60 (1986)(case remanded where there was significant doubt as to whether the appropriate standard for a well-founded fear of future persecution was applied). It does not appear from the decisions that they did apply the presumption set forth in the regulations, which constitutes reversible error. Thus, the Ninth Circuit should have remanded the case to Board for a specific determination, in the first instance, of whether the Board properly applied the presumption. See INS v. Ventura, 537 U.S. 12 (2002). Instead, the Ninth Circuit decided on its own that the Government rebutted the regulatory presumption by establishing changed country conditions in India.

In light of the foregoing, the Ninth Circuit failed to follow Supreme Court precedent after the IJ and Board failed to

apply the regulatory presumption.[3] Accordingly, the case should be remanded to allow the Board to specifically address the regulatory presumption and the issue of changed country conditions in India as they apply to Petitioner's case.

II. The decision of the Ninth Circuit is flawed and inconsistent with prior Ninth Circuit law

The decision of the Ninth Circuit is flawed and inconsistent with prior Ninth Circuit law. The Immigration Court concluded, and the Board and Ninth Circuit agreed, that country conditions have significantly improved for Sikhs, including AISSF members. This was the basis for the denial of asylum. However, the alleged changed country conditions, which cited improvement in some areas and significant problems in others, were not sufficient to rebut Petitioner's well-founded fear of persecution.

In Singh v. Ashcroft, 2003 WL 22170683 (9th Cir. September 8, 2003)(Appendix E), the Ninth Circuit Court of Appeals analyzed an asylum claim for a Sikh who supported the All India Sikh Student Federation (AISSF). The asylum applicant had been arrested, beaten, and detained on three occasions. The Ninth Circuit concluded he had suffered past persecution warranting a presumption of future persecution. Relying on the same 1996 Country Report and the 1997 addendum, the Ninth Circuit held that the Government failed to overcome the presumption of a well-founded fear of persecution. "Although the 1996 country conditions report

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[3] Even if it can be said that the Court analyzed the case using the regulatory presumption, the standard the Government was held to did not rise to a preponderance of the evidence. The evidence submitted was insufficient to overcome the presumption.

describes the level of violence as 'lower' and the 1997 addendum states there was improvement in the situation in the Punjab, there were still unexplained bombings, and murders of Sikh activists, for which policemen were on trial." Id. "The report also notes that the investigation of deaths at the hands of the police has at best been a slow process and custodial abuse and other police abuse remain a significant problem." Id. Since the Government did not rebut the presumption, the Petition for Review was granted.

In the instant case, a different panel of the Ninth Circuit ruled that the information contained in the same country reports was sufficient to overcome the presumption of a well-founded fear of future persecution. (Ninth Circuit decision, p. 2) The Ninth Circuit found these reports, especially the 1997 addendum, show that the conditions changed so fundamentally that Petitioner no longer has a well-founded fear of persecution. The Ninth Circuit's holding entirely overlooks the other sections of the report to show that conditions are still bad in India and have not fundamentally changed in a manner sufficient to rebut the presumption. In addition to the contrary evidence discussed in Singh, the 1997 Addendum states "custodial abuse and other police abuses remain a significant problem, despite efforts by the National Human Rights commission and the courts to eliminate these problems." (AR 111) Additionally, as noted by the Immigration Judge, there are still bombings going off and people arrested. The Judge also states in his decision that if you are arrested, you will be abused.

The decision in the instant case also conflicts with another Ninth Circuit case that addressed the same 1996 Country Report that was at issue in the instant case. Kataria v. INS,

232 F.3d 1107, 1114-15 (9th Cir. 2000).[4] In that case, the asylum applicant was a member and treasurer of the AISSF. The Ninth Circuit concluded that he had suffered past persecution and examined whether the Government rebutted the presumption of a well-founded fear of persecution. Id. Examining the same 1996 Report that was introduced into evidence in the instant case, the Court found "the record clearly shows the evidence of country conditions is not sufficient to rebut the presumption." Id. at 1115. The Court noted that the profile describes the level of violence in Punjab as only "lower" and that authorities continued to commit extrajudicial killings. Id. Accordingly, the Petition for Review was granted.

In the instant case, the Ninth Circuit's decision is in apparent conflict with two of its prior decisions. Although the Court in Kataria did not appear to have been presented with the 1997 Addendum, the holding and standard that was used to make a determination of whether the presumption was rebutted were inconsistent with the panel's ruling in the instant case. Additionally, the Singh case is in direct conflict. The Court held the Government to a far lower standard in rebutting the presumption than in Kataria and Singh. The standard was also far lower than that warranted under asylum law.

Petitioner was a member, speaker, and leader, in the AISSF. Petitioner testified that she still supported the demand for Khalistan and if she were in India, she would still be asking for Khalistan. As in Kataria and Singh, the country conditions evidence submitted was clearly insufficient to rebut

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[4] It does not appear the Court in Kataria considered the 1997 Addendum.

the presumption. This Court should grant certiorari to resolve the conflict within the Ninth Circuit and to address the appropriate standard to be followed when examining changed country conditions as it relates to the presumption of a well-founded fear of persecution.

III. The Ninth Circuit should have remanded Petitioner's case as the Agency never addressed whether Petitioner had demonstrated compelling reasons for being unwilling to return to her country of nationality arising out of the severity of the past persecution

Petitioner contends that the Ninth Circuit should have remanded the case to the BIA because the Agency never determined whether she has demonstrated compelling reasons for being unwilling to return to her country of nationality arising out of the severity of past persecution. 8 C.F.R. 208.13 (b)(1)(ii)(1999). The regulations specifically state that:

> "An application for asylum shall be denied if the applicant establishes past persecution under this paragraph but it is also determined that he or she does not have a well-founded fear under paragraph (b)(2) of this section, *unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence arising out of the severity of the past persecution.*"

8 C.F.R. § 208.13(b)(1)(ii)(1999)(emphasis added). If an applicant establishes such compelling reasons, he or she may be granted asylum unless barred by paragraph (c) of this section. This basis for asylum eligibility is based on a general

humanitarian principle, which was first recognized in Matter of Chen, 20 I&N Dec. 16, 19 (BIA 1989) and later codified in the regulations.

Petitioner contends that the regulations require an Immigration Judge to address the humanitarian ground for asylum arising out of past persecution if the judge finds the presumption of a well-founded fear has been rebutted. Although Petitioner did not specifically address this regulation in arguing he was entitled to asylum before the Ninth Circuit, the Court should have still addressed the issue because the Immigration Judge and Board were required to analyze Petitioner's asylum claim under § 208.13(b)(1)(ii) since she established past persecution.

In the instant case, the Immigration Judge never specifically addressed whether Petitioner's instances of past persecution alone warranted a grant of asylum on humanitarian grounds. Absent an explanation by the Immigration Judge, a reviewing court has no idea if or why the judge decided against a humanitarian grant of asylum. See Rodriguez-Matamoras v. INS, 86 F.3d 158, 161 (9th Cir. 1996)(stating that the BIA abused its discretion by failing to provide an explanation "sufficient to enable . . . a reviewing court to see that the [BIA] has heard, considered, and decided" the matter of humanitarian asylum). Since the Immigration Judge and the Board altogether failed to address whether the level of persecution was sufficient to merit a grant of asylum for humanitarian reasons, the Ninth Circuit should have remanded the case for a determination of whether Petitioner established compelling reasons for being unwilling to return to India arising out of the severity of her past persecution. See Ventura.

In light of the foregoing, the decision of the Ninth Circuit must be vacated and the case remanded to allow the Agency to make a determination of whether a humanitarian grant of asylum is warranted under 8 C.F.R. § 208.13(b)(1)(ii).

CONCLUSION

In conclusion, the claims raised in this petition establish that the Ninth Circuit failed to follow its own precedent in finding Petitioner ineligible for asylum. Neither the Board nor the Immigration Judge gave Petitioner the benefit of the presumption of a well-founded fear of persecution. Additionally, neither the Board nor the Immigration Judge considered whether Petitioner warranted a humanitarian grant of asylum in light of the fact she established past persecution. Thus, the decision of the Ninth Circuit was incorrect. Accordingly, this Court should grant certiorari in this case.

Respectfully submitted,

Margaret Wong
Attorney for Petitioners
Margaret Wong & Associates Co., LPA
3150 Chester Ave.
Cleveland, Ohio 44114
(216) 566-9908
(216) 566-1125

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-74450
Agency No. A70-810-299

[Filed March 2, 2004]

HARPREET KAUR,
Petitioner,

v.

JOHN ASHCROFT, Attorney General,
Respondent.

Before: GOODWIN, WALLACE, and TROTT, Circuit Judges.

The Petition for Panel Rehearing is DENIED.

No further filings shall be accepted in this closed appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-74450

[Filed December 18, 2003]

HARPREET KAUR,)
Petitioner,)
)
v.)
)
JOHN ASHCROFT,)
Attorney General,)
Respondent.)
)

JUDGES: Before: GOODWIN, WALLACE, and TROTT, Circuit Judges.

MEMORANDUM*

Harpreet Kaur, a native and citizen of India, petitions for review of the Board of Immigration Appeals' ("BIA") dismissal of her appeal from an Immigration Judge's ("IJ")

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

denial of her applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). The BIA adopted the IJ's decision as its own. We have jurisdiction pursuant to 8 U.S.C. § 1252, and we deny the petition for review. *See Lata v. INS*, 204 F.3d 1241, 1244 (9th Cir. 2000) ("[T]he IJ's determination that an alien is not eligible for asylum must be upheld if supported by reasonable, substantial, and probative evidence in the record.").

Although Kaur demonstrated past persecution, the consequent presumption of a well-founded fear of persecution was rebutted by the 1997 State Department "Addendum to the India Country Profile." This document specifically concludes that membership in the All-India Sikh Students Federation ("AISSF") "in itself does not result in prosecution or mistreatment." While Kaur testified that she was not merely a member but rather a small-scale organizer of the AISSF, substantial evidence nevertheless supports the IJ's determination that relevant conditions in the Punjab changed so fundamentally between Kaur's incidents of past persecution and the date of her removal hearing that she no longer has a well-founded fear of persecution. *See Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 997, 1000 (9th Cir. 2003).

By failing to qualify for asylum, Kaur necessarily fails to satisfy the more stringent standard for withholding of removal. *See Alvarez-Santos v. INS*, 332 F.3d 1245, 1255 (9th Cir. 2003). Kaur is also not entitled to CAT relief because she did not demonstrate that it is more likely than not that she would be tortured if returned to India. *See* 8 C.F.R. § 1208.16(c)(2); *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003).

PETITION FOR REVIEW DENIED.

APPENDIX C

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File:A70 810 299 - Los Angeles

[Filed December 9, 2002]

In re: HARPREET KAUR	)
	)
IN REMOVAL PROCEEDINGS	)
	)
APPEAL	)
	)
ON BEHALF OF RESPONDENT: Surjit Singh, Esquire	)
	)

ORDER:

PER CURIAM: The respondent has appealed from the Immigration Judge's decision dated May 27, 1999. The appeal will be dismissed.

The respondent testified that she suffered past persecution on account of her membership in the All India Sikh Student Federation (AISSF), a group dedicated to an independent Khalistan. She indicatedthat she was among 40-50 people arrested and detained following a clash of opposing protest groups in 1991. The Immigration Judge concluded that the treatment the respondent received constituted past persecution. The Immigration Judge further concluded that the reduction

of tensions between the opposing groups, the similar treatment accorded all detainees by police, and the fact that the respondent last participated in the AISSF in 1992, demonstrates that the respondent does not have a well-founded fear of future persecution is she returns to India. The decision of the Immigration Judge is correct and is affirmed for the reasons stated therein. Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the district director, the respondent shall be subject to a civil, penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and Sections 240A,245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/

FOR THE BOARD

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

File No.: A 70 810 299

[May 27, 1999]

In the Matter of)
)
HARPREET CAUR,)
Respondent.)
)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Act - non immigrant overstay.

APPLICATION: Asylum; Withholding of Removal; Voluntary Departure; and Torture Convention.

ON BEHALF OF APPLICANT: Surjit Sing, Esquire

ON BEHALF OF SERVICE: Jerry Rishe, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 30-year-old native and citizen of India who came to the United States April 18, 1993 as a non immigrant B2 tourist authorized to stay for a limited period of time and she has stayed beyond that time. These facts have all been admitted and the respondent has conceded that she is remove able under Section 237(a) (1) (B) of the Act as a non immigrant who stayed longer than the time permitted.

The applications for relief are premised on respondent's claim that she was an activist in the All India Sikh Student Federation which was an organization of Sikhs were supported the Sikh position which included the establishment of a separate Sikh colony in India which would be known as Khalistan. In fact, actually, there were different factions in the Sikh movement but her faction in particularly did support the Khalistan movement.

She was a student at the University of Calcutta and lived in Calcutta with her father. She joined the organization in 1988 and around 1990 she became the president of her local organization in the school which had about 25 or 30 members. In conjunction with other chapters of the federation various meetings and demonstrations were held both in Calcutta and in the Punjab, which is the vast majority of Sikhs and Indian do live.

In November of 1989 she was active in the election campaign in the Punjab. She was arrested at a rally. Held for six days, beaten in various ways, and was released upon payment of a bribe.

In January of 1990 she was participating in a rally in Calcutta where she was arrested with 12 others. She was

speaker and a principal organizer at this rally. She was held for two days according to her asylum application or three days according to her testimony today and was also beaten as before and was released as before when her father paid a bribe to the police officers. She continued to be active in holding rallies and meetings, although these were generally smaller rallies and meetings, 10 to 15 people, unlike the 1990 rally of 40 to 50 people. The police never came to these rallies and she was never molested.

In November of 1992, once again in Calcutta, she was the organizer and principal speaker in a rally of 25 to 30 people and the police did come because there was an encounter with an opposition party, the BJP Party, and another Hindu organization which opposed her group and opposed Khalistan. The police broke up the resulting fight with the batons and teargas. The respondent feels that the police were biased against her organization and targeted just her organization and arrested just members of her organization. They only arrested six people total. However, the respondent was injured by a rock that was thrown by the Hindu activist when they were attacking her group and she was able to get away. However, she was particularly scared after this incident. She left college even though she has not completed her course of instruction there and hid with a friend who lived some distance away and she stayed in hiding from that time until she left the country in April of 1993.

In the interim she did obtain a visa to come to the United States. So presumably she went to the U.S. Consulate in Calcutta, or perhaps someone else did it on her behalf. But she avoided being in public and avoided the police.

The police came to her father's house at least twice, possibly more. Her testimony was a little bit vague on that

point. But on any event the harassment to the father was sufficient that the father decided to relocate from Calcutta to Punjab. She has even stated that the police threatened the father that if he didn't reveal his daughter's whereabouts he, himself, could be acted on and possibly that is why he left Calcutta.

The respondent arrived in the United States April 18, 1993 and two days later she married her husband Bot Winder Singh, who was already in the United States and who was a person she had known in India but only slightly and a long time ago. He presumably has been in the United States since at least 1981 because he is an applicant for legalization, according to the information that has been supplied to the Court.

In looking at the evidence before the Court, some things have more privative value than others. This is a corroborated case. However, the corroboration is principally in the form of Exhibit 7, a letter from the Sikh Student Federation in Calcutta, which does corroborate her claim, but is a sort of thing that could be obtained probably fairly easily. It is also corroborated by affidavits of her father and her friend, Suuinder Carr, with whom she took shelter in 1991 and 1992. Although oddly enough she hasn't produced an affidavit from the person who she took shelter with when she was really seriously in hiding after the November '92 rally. Obviously affidavits of people who aren't present are not a privative as testimony that which is subject to cross-examination. But the practical fact of the matter is that some people in India are not available to testify here. I do note that the father's affidavit doesn't mention any harassment directed to him. He merely mentions the two arrests that his daughter had and that she left the country in fear of further arrests.

Other kinds of more privative corroboration would obviously consist of medical records for the treatment that she received when she was injured as a result of these arrests or possibly statements from recognized human rights experts, that in fact she was a leader even though at a fairly low level, and she had these incidents happen. There are such individuals certainly in the Punjab who are active in keeping records. And we have some of those records supplied by the Council of Khalistan which keeps very close track of such things. Whether a reporter is available on Calcutta or not, the Court doesn't know. Although, presumably the Khalistan supporting organizations would be interested in any such information that would obtain corroboration for it because it does advance their cause.

Other evidence submitted by the respondent are some newspaper articles which are basically background information which deal with other people in other situations. Although they obviously have some bearing on the respondent's situation because they deal with how the Khalistan movement is treated in India. As far as the documents from the Council of Khalistan, I am very familiar with the Council of Khalistan which is located in Washington, D.C. and the evidence submitted by the Council of Khalistan cannot be considered to be objective evidence. This is a highly partisan organization which is trying to make a point, not trying to report data objectively. And the same thing is true with the congressional information. Unfortunately being elected to Congress doesn't give individuals any particular knowledge of the world and these are essentially are the opinions of these Congressmen, or possibly even the opinions basically of their constituents they have decided to support.

The State Department reports are entitled to significant weight. They are generally considered to be reliable, although

I never blindly follow them because the State Department does occasionally have an agenda of its own. There are certain countries that it wishes to present in a better light than others. Certainly information from such groups as Amnesty International, Freedom House, or other human rights activists that don't have any particular axe to grind would be far more useful than the Khalistan materials and would be entitled to weight equivalent to, although perhaps quite as great as the State Department. But we have very little of that in this case.]

In observing the respondent's demeanor during the hearing, she strikes me as the kind of person who is knowledgeable about the politics that she is discussing. She presents herself as the kind of person who would speak before crowds, who would take an activist role as opposed to many applicants for asylum who claim to have done things that are hard to believe based on their demeanor. But respondent does appear to be a person who believes in her principals and has even perhaps a fiery personality and a determination to support those things. Therefore, I do believe her testimony that she was the president of the college's chapter of the Sikh Student Federation. That she spoke at rallies, although they are fairly small rallies; that she took an active role in the elections of the Punjab; and, that she was arrested because of these activities.

If she was arrested because of these activities, then she was beaten, because the one the State Department agrees with the Council of Khalistan and all other sources on is that if you are arrested in India you are certainly going to be physically abused. The State Department concurs with that completely.

Now the question arises why was she arrested and why was she abused. Was it because of her belief, her political opinion supporting Khalistan or was it because she was

involved in riots that were violent assemblies? Obviously she said that her participation was entirely peaceful, but certainly many Khalistan rallies have been violent, and the one rally which she considers the most significant, the rally which caused her to leave India, was clearly a violent rally regardless of whether it was the Sikh Student Federation or the Hindu activist who started the trouble. Trouble certainly there was. There was a riot. There was rock throwing and the police intervened with teargas and batons. I am willing to credit respondent's belief that the police would have favored the Hindu activists because the police in Calcutta would likely to have been Hindus. It is very unlikely that many of them were Sikhs. However, there does appear to have been a violent rally and the fact that only six people were arrested may very well indicate that those were the people that were the trouble makers.

So, was the respondent arrested and abused because she was involved in violent rallies or because of her political opinion. The answer probably is that those two things are somewhat inseparable. And for the purposes of this case I will assume that she was arrested for her political opinion and beaten and tortured in various ways for that.

The question then arises whether that constitutes persecution under the Act. Obviously some things are very minor and wouldn't be considered persecution, they would be considered harassment. The police pushing people around, or knocking them down perhaps at a rally would not be considered persecution. But the kind of beating that she has described, which is the kind of beating that is described in all of these cases from India, which is also described in the background information; hair pulling, kicking with heavy boots, hand and feet being tied, beaten with a wooden cane, I would find would constitute persecution and therefore I find

that she has been persecuted in the past. Although I will admit that that determination is somewhat questionable but I will once again air on the side of the respondent and give her the benefit of the doubt.

Having been persecuted in the past for her political activities respondent is entitled to be granted asylum unless the Service can show the conditions in the country have changed significantly. As always when dealing the Punjab we have got conflicting information.

The respondent would argue that the conditions haven't changed, that horrible things are still going on, and point to the reams and reams of alleged incidents reported by the Council of Khalistan. The Service points to the States Department's opinion that things are basically normal. Of course, normal in the Punjab is probably not recognizable as normal in this country. Still bombs are going off. Still people are being arrested. But certainly based on what it was like in the past, which was between 5,000 and 8,000 people a year being assassinated or murdered by both sides, the situation is far different than it was.

I also have to take with a grain a salt the arguments that concern prominent people. What happened to Mr. Bitu is not necessarily relevant to what would happen to the respondent. He is a prominent person who mistreatment would certainly reported and known to the press. The incidences by respondent's counsel also doesn't apply to the respondent because these were very prominent people once again.

My assessment is that based on the very low level of activity the respondent had that she was essentially the leader of 25 to 30 Sikh students at the University of Calcutta. That

she participated in very small demonstrations and last participated in 1992, a long time ago.

In light of the much reduced problems of the Punjab I would not think that she would have a well-founded fear of future persecution if she returned to the Punjab. And I am assuming that the Punjab is where she would return to because her father no longer lives in Calcutta. If she returned to Calcutta there would actually be even less likelihood of any problems because there never was the amount of problems in Calcutta that there were in Punjab.

So, although I feel the respondent came to this country because she had a well-founded fear of persecution on account of having been persecuted, and she may still have a subjective fear that these things would happen again.

The fact of the matter is she doesn't seem to be very familiar with the current situation over there and the current situation in the Punjab is that the situation is much diffused and much less violent than it was. The party that she supported that ceased to duration that the SSF supported the Akali Dahl Mon faction actively participated in the last elections in the Punjab. The only hold one seat in the legislature. Obviously that party has been ignored by the Sikh majority in the country who is obviously tired of all these problems, tired of killings on both sides, and tired of the movement for Khalistan. The respondent may not agree with that. But, in fact people who agree with her campaigned in the election. They lost among their fellow Sikhs and there is not reason to believe based on current country conditions that she would have any objective reason to fear persecution if she returns now after these many years. It is extremely unlikely that the police would remember her. That anyone would be looking for her if she actively campaigned for Akali Dahl

Mon or participated in railies as she did before, she should not have any problems in that country.

Now I am not ignoring the fact that the respondent is settled here now. She has been here still 1993. She has got a husband and two children in this country and the reason for that is the Service just didn't adjudicate her application in a timely fashion. I guess you could make an argument that that worked in her favor, but it also caused her to become established in a country where she really doesn't have any basis for being established. So, as far as that humanitarian concern would go I would certainly give her the maximum benefit that I could.

For the reasons that I have just stated I that she is not a refugee. That she is not eligible for asylum or withholding of removal. Although she was tortured in the past, past torture, unlike past persecution doesn't give rise to any particular inference and since I have determined that she would not be very likely to be arrested in the future, I don't think she would be likely to be tortured in the future. Although, obviously arrest in India winds up being the equivalent of torture if it happens. So I would deny the Torture Convention claim as well.

The respondent as far as I can tell is deserving of voluntary departure. She is deserving a discretionary relief and I would grant her the maximum voluntary departure that I am able to do.

Therefore the Court's orders are as follows

ORDER

1. The respondent is removable under Section 237(a) (1) (B) of the Act as a non immigrant overstay.

2. Asylum, withholding of removal is denied.

3. Torture Convention relief is denied.

4. Voluntary departure wiil be granted until July 26, 1999 with an ultimate order of removal to India subject to the payment of a $500 bond no later than June 3, 1999.

LAWRENCE BURMAN
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before LAWRENCE BURMAN, in the matter of:

HARPREET KAUR

A 70 810 299

Los Angeles, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/_____
(Joy Taylor, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

August 22, 1999
(Completion Date)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-73442

[Filed September 18, 2003]

SUKHJINDER SINGH,
Petitioner,

v.

JOHN ASHCROFT, Attorney General,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A75-319-518.

JUDGES: Before: PREGERSON, THOMAS, and PAEZ, Circuit Judges.

MEMORANDUM[**]

[**] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Sukhjinder Singh, a native and citizen of India, petitions for review of the Board of Immigration Appeals' ("BIA") decision affirming the Immigration Judge's ("IJ") denial of his application for asylum and withholding of deportation, and denying his motion to remand to apply for relief under the Convention Against Torture. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review the BIA's decision for substantial evidence. *See Lal v. INS*, 255 F.3d 998, 1001 (9th Cir. 2001). We grant the petition and remand.

Taking Singh's testimony as true, as the BIA did, we find that the record compels the conclusion that Singh was persecuted on account of an imputed political opinion. *See Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995). Singh testified that the police arrested, beat and detained him for several days on two occasions because of his aid to militants and to obtain the names and whereabouts of the militants and the whereabouts of Singh's uncle, a Sikh political activist. The police again arrested, beat and detained Singh for several days on a third occasion for giving aid to the All India Sikh Student Federation ("AISSF").

Singh further testified that he was never formally charged, nor brought before a magistrate or judge on any of the occasions he was arrested. *See Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (where petitioner mistreated by the police is not the target of a legitimate criminal prosecution, he is entitled to a presumption that the government's actions were politically-motivated). The country conditions report upon which the BIA relies notes that by mid-1993, there were few if any terrorist groups still operating in the Punjab. The BIA's assumption that the police were acting in furtherance of the legitimate goal of eliminating terrorism is therefore not supported by substantial evidence.

Because Singh established past persecution on account of an imputed political opinion, he is entitled to a presumption of a well-founded fear of future persecution, and the government's evidence fails to rebut that presumption. *See Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000). Although the 1996 country conditions report describes the level of violence as "lower" and the 1997 addendum states there was improvement in the situation in the Punjab, there were still unexplained bombings, and murders of Sikh activists, for which policemen were on trial. The report also notes that the investigation of deaths at the hands of the police has at best been a slow process and custodial abuse and other police abuses remain a significant problem.

PETITION GRANTED and REMANDED.